No. 226

~~No. 1126~~

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IN THE

Supreme Court of the United States

October Term, 1957

STATE OF NEW MEXICO, ex rel.,
GRINNELL COMPANY, a Colorado Corporation,
GRINNELL COMPANY, INC., a Delaware Corporation
GRINNELL CORPORATION, a Delaware Corporation,
Petitioner,

vs.

THE HONORABLE D. A. MACPHERSON, JR.
Judge of Division Four of the District
Court of The Second Judicial District
of the State of New Mexico
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

CERTIORARI TO THE UNITED STATES SUPREME COURT SHOULD BE DENIED FOR LACK OF JURISDICTION TO REVIEW THE DECISION OF THE NEW MEXICO SUPREME COURT BECAUSE A FEDERAL QUESTION HAS NOT BEEN PROPERLY PRESENTED.

It is doubtful that this Court should exercise its discretion and review by certiorari the determination of the Supreme Court of the State of New Mexico of the matter

presented in the petition here. Special and important reasons are required for review by certiorari, in order to protect this Court from being overwhelmed with a mass of litigation.

Respondent, at the outset, questions the presentation of a Federal question below, and the required preservation of a substantial Federal question here, notwithstanding the affirmative statement by petitioner, (Petition, p. 5), of Constitutional provisions being involved, namely: Point 1. Amendment XIV, Section 1, Clause 2—Due Process and Point 2. Article I, Section 8, Clause 3—Regulation of Commerce. It is noted that petitioner makes no reference whatsoever in its petition and brief, in support thereof, to ever having raised the Constitutional issue of Point 2 below, (Petition, p. 9), and the reference made by petitioner to Point 1 readily discloses that, if the Federal question was ever raised below, it was clothed in secrecy and innuendo, and not clearly set forth as required. Respondent, therefore, submits that before proceeding further, this Court should deny petitioner its jurisdiction, and the petition should be denied.

The rule requiring jurisdiction and preservation of a substantial Federal question, in order to confer jurisdiction upon this Court, has been frequently repeated. The general rule as to what must appear in order to justify the United States Supreme Court in taking jurisdiction to review a decision of the state court was laid down by Mr. Justice Story, in *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 368, 9 L.Ed. 458, where he said:

> "The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is that, to bring a case within

the 25th section of the Judiciary Act, it must appear upon the face of the record: 1. That some one of the questions stated in that section did arise in the state court. 2. That the question was decided by the state court, as required in the same section. 3. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised and must have been decided in order to have induced the judgment. 4. That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case."

The rules thus formulated by Mr. Justice Story, although they did not, as he had hoped, close all future controversy on the point, have in general been adhered to by the court since that time, even though there have been some changes in the Statutes effecting the mode of review and in some respects, the decisions of the state courts, which are reviewable.

The statutory authority which the petitioners rely upon, as conferring this Court jurisdiction to review the decision of the New Mexico Court, is 62 Stat. 929, June 25, 1948, c. 646, 28 U.S.C. 1257 (3). This statute requires that, "... where any title, right, privilege or immunity is specially set up or claimed under the Constitution," the Supreme Court has jurisdicton to review a decision of a state court. The provision that the claim of a Federal right must be "specially set up or claimed" has been interpreted as requiring the right to have been previously raised in a timely manner and presented for decision to the highest court of the state. Thus, a preliminary step in showing that the state court's decision turned on a Federal question, one which the United States Supreme Court has uniformly

recognized as essential, is to show that a Federal question actually arose in the case. *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16, 17.

A second essential step in showing that the state court's decision actually turned upon a Federal question, is to show that the state court actually had presented to it, actually passed upon, and actually decided a question of this character, necessary to determination of the cause. *Southwestern Bell Telephone Company* v. *Oklahoma*, 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528; *Honeyman* v. *Hannan*, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350; *New York ex rel Rosevale Realty Company* v. *Kleinert*, 268 U.S. 646, 69 L.Ed. 1135, 45 S.Ct. 618. Thus, jurisdiction cannot be founded upon mere surmise that the decision of the state court turned upon a Federal question. *Lynch* v. *New York ex rel Pierson*, supra; *Adams* v. *Russell*, 229 U.S. 353, 57 L.Ed. 1224, 33 S.Ct. 846. Even if the state court has passed upon the Federal question, it must appear that it has been a substantial one. *House* v. *Road Improvement Dist.*, 266 U.S. 175, 69 L.Ed. 229, 45 S.Ct. 60.

A third essential which the appellant has omitted in his argument is a showing that the Federal question, which he bases his arguments upon, actually appears in the record. In reviewing the decision of a state court, the Supreme Court is bound by the record upon which the judgment is based, *Hedgebeth* v. *North Carolina*, 334 U.S. 806, 92 L.Ed. 739, 68 S.Ct. 1185, and it must be guided by that record as to whether the Federal question was seasonably raised. *Rooker* v. *Fidelity Trust Co.*, 261 U.S. 114, 67 L.Ed. 556, 43 S.Ct. 288.

In the immediate case, the appellant has completely omitted to affirmatively establish that the Federal question was properly raised in a timely manner. It should appear

from the record affirmatively, or by fair implication, that the decision of the Federal question was necessary to the determination of the cause. *Southwestern Bell Telephone Co.* v. *Oklahoma*, supra. In other words, as stated in *Moore* v. *Mississippi*, 88 U.S. (21 Wall.) 636, 22 L.Ed. 653, the United States Supreme Court is not required to re-examine the judgment of a state court simply because a Federal question may have been decided. This rule that the United States Supreme Court will not review the judgment or decree of a state court, where the record shows that it was, or may have been, rendered on a sufficient ground, which did not involve a Federal question, applies to cases involving both Federal and nonfederal questions, not only where the record discloses that the state court rested its judgment on both grounds, but also where it is not clear which of them was relied on, provided in both cases the nonfederal ground was sufficient in itself to sustain the judgment.

This rule is thus stated in *Seaboard Air Line Railway* v. *Duvall*, 225 U.S. 477, 56 L.Ed. 1171, 32 S.Ct. 790, 791, 792, 793 which arose out of a personal injury action, as the case at bar does.

> "That there was set up and denied some claim or right under the Constitution or a statute of the United States must appear upon the record. . . ."
>
> "This case does not come here from a Federal court, and we are therefore not a court of general review. It comes under § 709, Rev. Stat., and the power to review a judgment of a state court is limited and defined by that provision. . . ."
>
> "It was the obvious duty of counsel, if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right 'specifically set up' and denied by the court. 'It must

appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and then a decision against the right claimed under it'. Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error. Maxwell v. Newbold, 18 How. 515, 15 L. ed. 508; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Gillis v. Stinchfield, 159 U.S. 658, 40 L. ed. 205, 16 Sup. Ct. Rep. 131; Speed v. McCarthy, 181 U.S. 269, 275, 276, 45 L. ed. 855, 858, 859, 21 Sup. Ct. Rep. 613; Gaar, S. & Co. v. Shannon, decided at present term (223 U. S. 468, 56 L. ed.—, 32 Sup. Ct. Rep. 236). In Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699, this court said:

"This court has had frequent occasion to say that its right to review the judgment of the highest court of a state is specifically limited by the provisions of § 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege, or immunity specially set up and claimed under the Constitution or authority of the United States, which it is alleged has been denied by the judgment of the state court. In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220."

"In conclusion, we are of opinion that neither the instructions denied nor that objected to are sufficient to raise any Federal question which this court may review. The motion to dismiss the writ for want of jurisdiction is therefore granted."

In the case of *Whitney* v. *California*, 274 U.S. 357, 360, 361, 71 L.Ed. 1095, 47 S.Ct. 641, 643, which was a criminal case, it was held:

> "(1) It has long been settled that this Court acquires no jurisdiction to review the judgment of a State court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such State court. Crowell vs. Randell, 10 Pet. 368, 392, 9 L. Ed. 458, Railroad Co. v. Rock, 4 Wall. 177, 180, 18 L. Ed. 381; California Powder Works v. Davis, 151 U. S. 389, 393, 14 S.Ct. 350, 38 L. Ed. 206; Cincinnati, etc., Railway v. Slade, 216 U.S. 78, 83, 30 S.Ct. 230, 54 L. Ed. 390; Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U.S. 341, 343, 40 S.Ct. 330, 64 L. Ed. 601; New York v. Kleinert, 268 U.S. 646, 650, 45 S.Ct. 618, 69 L. Ed. 1135.
>
> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. Dewey v. Des Moines, supra, 199 (19 S. Ct. 379); Keokuk & Hamilton Bridge Co. v. Illinois, supra, 634 (20 S.Ct. 205). And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal, . . . by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. See Oxley Stave Co. v. Butler Company, 166 U. S. 648, 660, 17 S.Ct. 709, 41 L. Ed. 1149; Capital City Dairy Co. v. Ohio, supra, 248 (22 S.Ct. 120); Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134, 34 S.Ct. 874, 58 L. Ed. 1245; Bass, etc., Ltd., v. Tax Commission, 266 U.S. 271, 283, 45 S.Ct. 82, 69 L. Ed. 282."

Without variation, this Court has followed the foregoing prerequisite before reviewing by certiorari a state

court decision. See also *Bailey* v. *Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66.

The questions which this petitioner sought to present to the Supreme Court of New Mexico for determination, are stated by petitioner in the Petition for Writ of Prohibition, addressed to that Court. (R. 1 to 5) Petitioner there did not raise either of the Federal Constitutional provisions now asserted as grounds for jurisdiction. Fruitless search has been made of the Petition for Writ of Prohibition filed in the New Mexico Court for a reference to either clause of the Constitutions presented here for the first time, but not even a mention of the term "due process" or "regulation of commerce" can be found. In Petition for Writ of Prohibition, the issues are ordinarily established by the petition and response, but an examination of the response and the affirmative defenses to the Alternative Writ of Prohibition, (R. 54 to 57) again discloses no issue involving the presently asserted Constitutional provisions.

Although the briefs of the parties are no part of the record, and a claim of jurisdiction cannot be sustained by reference to briefs, *Lynch* v. *New York ex rel Pierson*, supra, it should be stated that below the petitioner submitted a 19 page Brief-in-Chief, but no mention of a Federal question is found there. The respondent filed an Answer Brief of 34 pages below and, again no Federal question was presented. The Reply Brief of petitioner consisting of 23 pages presented no substantial Federal question, although petitioner once mentioned the phrase, "due process". Under the authority cited above, it is readily apparent that petitioner failed to present a substantial Federal question before the Supreme Court of New Mexico.

The decision of the New Mexico Court was not predicated upon a Federal question. (R. 91 to 105). True, in the

14 page well-reasoned, thoroughly documented opinion, Mr. Justice Sadler, speaking for a unanimous court, did once use the words, "due process", but that alone does not even indicate that the determination of that court was founded upon a Constitutional provision. On the contrary, the New Mexico Court bottomed its position on a question of fact, and thereto applied the rules of principal and agent and held, as a matter of fact, that Grinnell Corporation and Grinnell Company, Inc. were each "an alter ego" of the corporation qualified to do business in New Mexico. Petitioner here would have a trial de novo. No Federal question was the basis of the New Mexico decision. Indeed, the determination of a Federal question was not necessary to dispose of the issues. Accordingly, the Petition for Writ of Certiorari should properly be denied forthwith.

REPLY TO PETITION FOR WRIT OF CERTIORARI

Reply to the Petition for Writ of Certiorari is probably unnecessary in view of the foregoing. Nevertheless, Respondent will briefly answer the Petition and for the convenience of the reader will adopt and follow the style used by petitioner.

Jurisdiction

Under the title of Jurisdiction, petitioner alleges that 28 U.S.C. 1257 (3) confers jurisdiction on this court (Petition, p. 2). This argument has been answered by respondent above. Petitioner then attempts, without statutory authority, to invoke jurisdiction upon the grounds that the New Mexico decision stands alone and is catastrophic, not only to petitioner, but to the entire national business community. (Petition, p. 2). The zeal of advocacy has carried petitioner far afield.

The contention of petitioner that the New Mexico decision is without precedence, (Petition, p. 3) is readily refuted by reference to the New Mexico decision alone, (R. p. 101) where eleven of the many cases on this subject are cited by the New Mexico Court, as precedence. Petitioner also alleges that the New Mexico decision is in conflict with the prior adjudications of this court, (Petition, p. 3) and such argument is equally unfounded, as the New Mexico Court, contrary to doing violence to the rule of *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 69 L.Ed. 634, 45 S.Ct. 250 and *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, actually made its decision within the frame-work of those cases. Likewise, the assertion by petitioner that the New Mexico decision "stands in direct conflict with . . . principals of law generally deemed well-established" (Petition, p. 3) is without basis, as vast authority cited by the New Mexico Court and the additional authority cited herein readily discloses.

Flying in the face of the expressed language of the Supreme Court of New Mexico, petitioner interprets the holding of that court to be founded solely upon the use of a common trade name. (Petition, p. 4) Petitioner states, "That Court did not find that the subsidiary was the agent of the foreign corporation . . ." and, therefore, the decision ". . . should not be permitted to stand." The essence of the argument here, by petitioner, is that the New Mexico decision, not being predicated upon the principals of agency, this court should reverse such decision. The only reasonable inference that can be drawn from such argument is that if the New Mexico decision is in fact founded upon agency, then petitioner concedes the decision is proper. The New Mexico Court states that "agency" was required if, ". . . the plaintiff in the action, out of which this proceeding in prohibition grows . . ." (R. 100) was ". . . to be afforded practi-

cal relief." (R. 101). In the following paragraph of the New Mexico decision, the court then held that the required "agency" existed, and the New Mexico decision concluded with the following paragraph:

> "Since this is exactly the situation confronting us here, and the service on Grinnell Company is admittedly good, this brings before the court the two missing corporations, each as an *alter ego* of Grinnell Company ..." (R. 104)

It is, therefore, submitted by the respondent that, predicated upon petitioner's argument, the New Mexico Court having found the required agency and having rendered its opinion thereon, the New Mexico decision is not only sound and based upon persuasive precedent but this court should summarily deny the Petition for Writ of Certiorari.

Petitioner belabors the injured plaintiff in the original action from which this proceeding arises for delaying the assertion of his claim. However, petitioner does not point out that the complaint was filed within the statutory period of limitations in New Mexico, nor does it mention the very serious and permanent injuries sustained by the plaintiff, Larnie Schultz, and the long period of hospitalization and protracted treatment required. Neither does the petitioner mention the time which was consumed in fruitless negotiations toward settlement with the petitioner and its insurance carrier. Furthermore, the petitioner shows no prejudice by such rightful delay.

Questions Presented For Review

1. For the first time, petitioner now raises questions not presented in the case previously.

Here again, petitioner contends the decision of the New Mexico Court was not rendered upon the principals of

agency but merely upon the use of a common trade name. (Petition, p. 5) As this argument has been refuted above, more will not be said.

2. The ascertainment by petitioner that the New Mexico decision is in violation of the Commerce Clause should not only be denied, since it is raised here for the first time, but also for the reason that such a contention is absurd and contrary to fact.

Constitutional Provisions Involved

This twofold attack was not made in the Courts of New Mexico and, therefore, as pointed out above, the entire petition should fail.

Statement of the Case

1. The chronology stated by petitioner is substantially correct, but the inference that the service upon the foreign corporation was "admittedly" defective, is improper. The petitioner in the original action below alleged the service was defective. (R. 18 and 23) However, this was contrary to the position of the plaintiff below and petitioner's contention certainly is not in harmony with the decision of the New Mexico Court interpreting a New Mexico Statute. (Sec. 21-3-6 N.M.S.A. 1953)

2. Petitioner's Statement of Facts is hardly correct, much less complete.

   (a) Grinnell Company is undoubtedly a Colorado corporation, qualified and doing business in New Mexico, and has a statutory agent if not an office within the confines of the State of New Mexico. Although, perhaps, Grinnell Company as such did not manufacture and sell the defective metal hanger in question, certainly it was

the agent for the principal Grinnell Corporation which did manufacture such hanger and its co-agent Grinnell Company, Inc. sold such hanger.

(b) Grinnell Company, Inc. although a Deleware corporation, was found by the Supreme Court as a matter of fact to be doing business in New Mexico.

(c) The statement that Grinnell Corporation was "not in fact" doing business in New Mexico, is contrary to the finding of the Supreme Court of New Mexico.

(d) The three Grinnell Companies do business under the same roof, through the same individuals.

(e) Although petitioner alleged below that each of the subsidiaries employed and paid their own employees, (R. p. 8) the same was denied by the respondent. (R. 55)

(f) The allegations that subsidiaries conduct their business separate and distinct from the parent, was alleged below, but certainly not admitted by the respondent.

(g) The petitioner alleged separation of records and bank account before the Supreme Court of New Mexico, but the same was denied by the respondent. (R. 55)

The alleged failure of the respondent to submit evidence concerning the day to day business operations of the petitioner was because the burden of proof was upon petitioner, in which it is apparent that it failed. Furthermore it was respondent's desire not to delay the action.

The repeated assertion, by the petitioner, that the "sole

evidence" to support the New Mexico decision was the use of a common trade mark, is not only denied, but a review of the New Mexico decision will readily prove the contrary. Furthermore, reference to advertising material distributed by Grinnell, shows not only the use of the common trade name, but contrary to petitioner's contention of separate entities, a full-blown plan of common advertising in general, and an express "holding out" of a completely unified and integrated single organization. Referring to the advertising circular of petitioner, of which respondent obtained a copy, (R. 47) it is noted that the petitioner itself shows the Colorado corporation as merely a sales office and warehouse of the parent corporation. Proof that the Colorado corporation exists in name alone, and is in fact but an agent of this octopus corporation, is shown by petitioner's own advertising where the Colorado corporation is merely listed as a Denver office, being one of 34 strategically located warehouses scattered throughout the continent. Reference is also made in this same connection to Exhibit 15 below, which the petitioner did not include as part of the record, but which the respondent has separately submitted under the certificate of the Clerk of the Supreme Court of the State of New Mexico, and which completely substantiates the agency holding of the New Mexico Court.

3. The Constitutional question which has been raised has been thoroughly discussed above and is not restated here.

POINT I

Exercise of Jurisdiction Over Petitioner by the New Mexico Court Does Not Violate the Due Process Provisions of the United States Constitution.

The prior pronouncements of this Court, cited under Point I by petitioner, are not only recognized by respondent,

but the rules enunciated therein are conceded. However, such pronouncements rather than supporting petitioner, actually sustain respondent. Even petitioner acknowledges that Grinnell Company was qualified to do business in New Mexico with a duly designated statutory agent in that state, and that the service of process was properly made upon such agent. Certainly then, as the New Mexico Court held, it must be admitted by all that Grinnell Company was "present" in New Mexico, and that Grinnell ompany was "found" in New Mexico. Clearly, the "certain minimum contacts" were present, as were the required "contacts" "ties" and "relations".

Cannon Mfg. Co. v. *Cudahy Packing Co.*, supra, involved the review of a Federal Court case, rather than a State Court decision. No Constitutional question was presented, or decided, and the trial court concluded, "upon the evidence that the defendant was not present in North Carolina." Patently, this Court is not the trier of fact in matters of this nature, but a court of review. In the case at bar, the New Mexico trial court, on the Motion to Quash "found" petitioner in New Mexico, and the New Mexico Supreme Court on Writ of Prohibition, likewise "found" the petitioner "present" in New Mexico.

The holding of the court in the Cannon case was that, under the facts of that particular case, separate corporate entity had been sufficiently maintained. Under the facts of the instant case, the New Mexico Courts held that the separate corporate entity had not been sufficiently maintained but, on the contrary, "that the three Grinnell Corporations are actually and, in fact, one giant octopus corporation and as such are amenable to process in New Mexico." (R. 96)

International Shoe Co. v. *Washington*, supra, originated in a state court, as does the instant action, and it was therein held that the operation of a corporation, which

established "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice", shall be subject to the jurisdiction of such state court. The New Mexico Court found, and petitioner does not deny, that the operations of Grinnell Company, not only established ties and contacts in New Mexico, but that, it was actually "doing business" in New Mexico. Certainly, it is "reasonable and just, according to our traditional conception of fair play and substantial justice" to hold petitioner answerable in New Mexico to Larnie Schultz for the grave and serious injuries resulting to him from the breach of duty by Grinnell. If steam fitter, Larnie Schultz, who was made permanently disabled by the negligence of Grinnell, is denied his right to sue in New Mexico, then he is forever and effectively denied his day in court, and his wife will be forced, throughout the balance of her life, to take in washing and ironing, in a feeble attempt to supplement his support.

New Mexico has followed the precept of Mr. Justice Black in his separate opinion in *International Shoe Co.* v. *Washington*, 326 U.S. at 324, and has opened "the doors of its courts for its citizens to sue corporations whose agents do business in" that state. Grinnell Company is the agent of Grinnell Corporation and Grinnell Company, Inc. and Schultz, a citizen of New Mexico, by ruling of the highest court of that state, has been accorded the right to sue in the courts of that state; this court should not now deny him such relief, notwithstanding the solicitation to the contrary.

POINT II

Jurisdiction of Respondent Over Petitioner is Not a Violation of the Commerce Clause of the United States Constitution.

Petitioner's Point is not well taken because he failed to

raise it in a timely manner and because the cases he cites here are not applicable. The petitioner's prime authority is *Michigan Cent. R. Co.* v. *Mix*, 278 U.S. 492, 73 L.Ed. 470, 49 S.Ct. 207, where a resident of Michigan was killed in Michigan while being employed there by a Michigan railroad corporation. The court held that the suit could not be filed in Missouri where the only ostensible purpose was that of bringing the suit at a place where the chances of recovery would be better. The court felt that such an action would violate the traditional conception of fair play and substantial justice. The other authorities cited by Petitioner, under this Point, follow the holding of this case.

The statement by petitioner that the New Mexico decision will wreck the national business economy, has no basis in fact.

POINT III

The Decision of the New Mexico Supreme Court is Well Founded in Precedent and Conforms to the Decision of this Court, as Well as the Weight of Authority.

Under this Point, petitioner contends that the authority cited by the New Mexico Court is inapplicable, upon the grounds generally that in the cases cited agency was found as a basis for those decisions. The reason is unknown, but petitioner consistently contends that the New Mexico decision has no relevancy to the doctrine of agency. As has been pointed out previously by respondent, this contention is directly opposed to the very language of the New Mexico decision and, therefore, the authority cited by the New Mexico Court is not only appropriate but fully substantiates the New Mexico decision.

Petitioner, in turn, cites cases where the courts found that there had been in fact a sufficient separation of the corporate identity. Naturally, those cases are not in point here because of distinguishable factual situations.

In recent years, huge industrial empires have been developed through the media of interlocking directorates and a majority stockholder's domination of one corporation by another, thereby giving rise to intricate inter-corporate relationships. Because of the adoption of this type of organization, where the separate existence of the component parts is often more ostensible than real, the problem of recognition of corporate entities has assumed considerable importance under varying circumstances.

In the immediate case, the New Mexico Supreme Court has decided that there was in effect one giant corporation and that corporate entity had not been sufficiently preserved to prevent the service of process upon the subsidiary from being effective upon the parent. The Court found factors in addition to the complete stock ownership which were sufficient to convince them that the form of corporate separation was a mere fiction and that the substance of the transaction was that there was really only one corporation. Corporate separation had not been properly maintained and the subsidiary was only a mere agent or instrumentality of the foreign parent. Thus, the Court held that the foreign parent corporation was "doing business" within the state so as to be amenable to the state's jurisdiction for service of process.

As a general rule, the mere ownership and control of the stock of another corporation which is doing business within that state is not enough to constitute doing business within that state by the foreign parent corporation so as to subject it to the jurisdiction of the state for service of

process. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, supra. Thus, where the corporate entity has been maintained, a parent and its subsidiaries are, without more, considered as separate and distinct, with each being held responsible only for its own acts and obligations. *Garber* v. *Bancamerica-Blair Corp.*, 205 Minn. 275, 285 N.W. 723. However, if the subsidiary is so controlled and its affairs are so conducted that it is a mere department or subdivision of a unified economic enterprise, there will be no compulsion to give the subsidiary recognition as a separate concern. The fiction of corporate entity may be disregarded, under certain conditions such as the instant case, and service of process on a local subsidiary corporation will constitute effective service on the foreign parent corporation. *Fish* v. *East*, 114 F.2nd 177 (10th Cir. 1940); *Mas* v. *Orange-Crush Co.*, 99 F.2nd 675 (4th Cir. 1938); *Atlantic Greyhound Lines* v. *Metz*, 70 F.2nd 166 (4th Cir. 1934); *cert denied*, 293 U.S. 562, 79 L.Ed. 662, 55 S.Ct. 73; *Industrial Research Corp.* v. *General Motors Corp.*, 29 F.2nd 623 (D.C., N.D. Ohio 1928).

In the case of *Industrial Research Corp.* v. *General Motors Corp.*, supra, the court, in addition to the other factors, relied upon the advertising of the parent corporation: "... which imply most clearly that the alleged local agencies, although distinct corporations, are mere adjuncts to the business of the ..." parent corporation. There the court held that the subsidiary was a "mere instrumentality or adjunct" of the foreign corporation and disregarded the corporate entity for service of process.

It is submitted that in proceedings such as this, the legal presumption favors affirmation, and the burden of proof rests upon the petitioner. It is further submitted that the petitioner has utterly failed to develop facts or cite controlling authority to warrant the reversal.

CONCLUSION

The New Mexico Court did not base its decision on Federal grounds but found that the separate corporate entity of the petitioner had not been sufficiently preserved, and therefore that the foreign parent corporation was amenable to the service on the subsidiary.

The court states that the question is not whether there has been sufficient service to satisfy the requirements of due process, because there is no question but that good service has been made on the Grinnell Company. The decision of the court was "... that the parent organization, itself, Grinnell Corporation, was doing business in New Mexico through the agency of one of its subsidiaries, Grinnell Company, and that service on the latter sufficed..." as service on the parent company. (R. 101)

Thus, for the reason that a substantial Federal question is not involved, that a claim of Federal right was not properly raised or presented to the New Mexico Court and does not appear in the record, and because the New Mexico Court did not consider Constitutional issues posed now for the first time by petitioner, and because the decision of the New Mexico Court is based on substantial, independent, non-federal grounds, the respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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